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JAMES H. McKENNEY,
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138.

of October Term, 1900.

Brief of Simpson, Brainard & Johnson
for Appellant.

IN THE

reme Court of the United States.

IN EQUITY.

Filed Nov. 9, 1900.

James Holly, Petitioner and Appellant,

vs.

Domestic and Foreign Missionary Society of
e Protestant Episcopal Church in the United
ates of America and E. Walpo Sickels,

(RECORD No. 17,523.)

PEAL OF JAMES HOLLY FROM THE UNITED STATES
RCUIT COURT OF APPEALS FOR THE SECOND
RCUIT.

BRIEF FOR APPELLANT.

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IN THE SUPREME COURT OF THE UNITED STATES.

IN EQUITY.

James Holly, Petitioner and Appellant,

vs.

The Domestic and Foreign Missionary Society of the Protestant Episcopal Church in the United States of America and E. Walter Roberts.

October Term, 1900.

No. 138.

BRIEF FOR APPELLANT.

STATEMENT OF FACTS.

By his will and codicils, the Rev. James Saul, of Philadelphia, who died on the sixteenth day of November, 1887, gave his entire residuary estate to the Domestic and Foreign Missionary Society of the Protestant Episcopal Church in the United States of America. (Record, page 179.) The inventory of the estate was not put in evidence, but it appeared (Record, page 105) that in addition to some $2493.03 cash, the testator was possessed of bonds of the North Penn Railroad and of the United Railroads of New Jersey, which were sold by Trotter, a broker, in August, 1888, and in February, 1889, upon the order of Thompson, one of the executors,

for $13,924.75. The fact that these sales had been made does not appear to have been known by Watson, one of the executors, nor by the missionary society, until after the settlement with the missionary society had been made. It was established by the production of the account book kept by Thompson.

It appeared (Record, page 50) that the last moneys in the Saul estate, either by way of dividends or from sale of securities, were received on the eleventh day of March, 1889, and that on the twelfth day of March, 1889, all had been withdrawn by Thompson. The son of the latter (Record, page 50) testified :—

> × Q. What was the total of the moneys deposited from the Saul estate between the dates of December 29th, 1887, and March 11th, 1889? A. $18,912.78. × Q. And the account book shows that all that money was drawn out of Mr. Thompson's bank on March 5th, 1889, except $315.99? Is that so? A. Yes, sir. × Q. No part of those moneys so paid out, to your knowledge, was paid to the board of domestic and foreign missions, was it? A. No, sir.

In 1889 Thompson and Watson filed their account as executors of the said estate, in which they charged themselves with the estate as the same had been invested. (Record, page 179.) This was duly audited by the Orphans' Court of Philadelphia County, which court had sole and exclusive jurisdiction thereof. The adjudication by one of the judges, the Hon. W. N. Ashman, was filed on the fifth day of November, 1889, and was duly confirmed. (Record, page 179.) In it the judge said: "Vouchers were produced for the credits "claimed in the annexed account, and the distributive bal- "ance was shown to be $15,803.70." A balance of $14,927.54 was ascertained by said adjudication to be in hand, and it was said, regarding the same, "which is awarded to the Domestic "and Foreign Missionary Society of the Protestant Episcopal "Church in the United States of North America."

Excepting Thompson, all were ignorant of the fact that the property had been converted to his use by the former, and

that no estate remained. The decree was made upon the supposition, induced by the account itself, that an estate was in hand for distribution amounting to $14,927.54, which, under the terms of the will, was awarded to the residuary legatee.

The co-executor, Watson, though he thought Thompson was dilatory in his settlement, claimed, probably truly, that he had no suspicion the estate had disappeared. He (Record, pages 60, 61) testified:—

> Q. You supposed, when the account was filed, that as soon as it would be settled, it would be paid? A. Yes, sir. Q. Did you know when these securities were sold? A. No; I never knew they were sold. Q. Did you suppose they were on hand at the time of the adjudication of the account? A. I certainly did. I supposed they were in his safe. Q. And you never knew that they were sold at all, did you, until about the time the money was paid over, or did you know when they were sold at all before that? A. I didn't know they were sold then. Q. Did you ever ask Mr. Thompson to show you those securities from the time that you handed them over to him until the time this money was paid over? A. I did. Q. When and how long before? A. A very few days before the money was paid over. Q. What answer did he give you? A. That if I came down the next day he would have the securities there at his office. Q. Do you mean the 19th? A. Yes, sir; I was to come down the 19th, and he would have the securities—the bonds, as I called them—at his office, No. 1001, and the next morning I got this note that you have just read. Q. Had you never before that asked for these bonds to look at them or see them? A. No, sir; because I never had any suspicion of his honesty. The bonds were given him to keep until he transferred them as bonds to New York. Q. But you never made any demand upon him positively for the exhibition of those bonds, or the production of them to you, from the time that you handed them over to him until that day? A. No, sir; not to my recollection. I don't think I did, and I don't recollect it. Q. Did you or did you not suppose that you would have to sign the transfer of those securities in any shape or form, as executor? (Objected to as immaterial.) A. I did not. It didn't come into my mind at all. You will understand

that I am not a business man. Q. This letter states on April 15th, 1890, as follows: "Has the treasurer yet received the legacy to the board of the late Dr. Saul? Mr. "Thompson, my co-executor, promised me more than two "weeks ago that you should have it this month. Has it "reached you? It is no fault of mine that the money was "not paid over more than a year ago, and I am disgusted "at the shilly-shallying which has deferred it to this late "day. I have offered, time and again, to take the whole "charge of the business and relieve him of it, but as he is "a lawyer and presumably a man of business, I couldn't "press him." Did you, at the time you wrote that letter, understand that the securities had been turned into money? A. No. When I say money there, it was simply a general term in my mind for money's worth. I meant the bonds. Q. You say in this letter that you had offered time and again to take the whole charge of the business. For how long a time had you been making that offer to him? A. Every time I saw him, nearly, and he declined. Q. Do you mean from the time of the adjudication. A. Do you mean when the account was rendered in court? It was soon after that, I suppose. Q. Were you present when the account was settled in court? A. Yes, sir. Q. Did you or did you not understand from Mr. Thompson that after the confirmation of the account—that is, when the adjudication was filed—unless exceptions were filed to the adjudication within two or three weeks, the money would be payable forthwith, or that the legacy would be payable forthwith? A. My understanding was that it would be payable at once; yes, sir. I supposed it was payable at once, of course. I wanted it settled within two or three months afterwards, but, as a lawyer, he said to me, "The judges are not disposed to give us a quittance "until within a year," and I supposed he knew more about the law than I did. Q. You were then told that within a year the account should be settled in the first instance? A. That is what I inferred from what he said. Q. Did you say that to the officers of the Domestic and Foreign Missionary Society in any of your interviews with them? A. No, sir; I don't think I had any correspondence with them until the end of the year. I was satisfied, from his being a lawyer, with his statement that the judges did not care to release us until the year was out. You see, that is one of the difficulties about a layman in the hands of a lawyer. He may be misled.

On the 29th May, 1890 (Record, page 32), Watson wrote to Langford, general secretary of the missionary society, in these words:—

162 N. 20th St.,
PHILADELPHIA, May 29th, 1890.

MY DEAR DR. LANGFORD:—My co-executor seems to be invulnerable to any shaft that you or I may send. After learning of the forfeiture of his last word, I wrote him as sharp and scathing a letter as I knew how. But it does not seem to have disturbed him a bit, for he has sent no reply. Yesterday I called at his office to give him a piece of my mind in spoken displeasure, but after waiting for him till I was tired I came away with my wrath still bottled up. I have now spoken to a lawyer on the subject (a prominent member of our church here) and he has promised to give me his assistance.

He says that Thompson is a good man, and a busy lawyer, but dilatory & procrastinating to the last decree; the latter I am quite sure is true—too true.

You may depend upon it I will now follow the matter up; for my own peace & quietness, if nothing else. For your information I will say, that most of the legacy is in bonds; so that it is accumulating interest to the credit of the legatee.

Faithfully yours,

BENJAMIN WATSON.

Watson (Record, page 63) testified:—

Q. You said just now that you had never written to them to inform them of that fact. Please look at the letter of May 29th, which I now hand you, and state whether you did not write to them and tell them that they were in bonds, &c., "For your information, I will "say that most of the legacy is in bonds, so that it is ac- "cumulating interest to the credit of the legatee." Did you not write that? A. Of course I wrote it. × Q. That was on the 29th of May, was it not? A. Yes, sir. × Q. That was your understanding, was it? A. Yes, sir. × Q. From beginning to end? A. Yes, sir. × Q. That the estate was maintained in bonds? A. Yes, sir. × Q. And that the bonds were to be delivered over to the society? A. Yes, sir. × Q. That letter was written in pursuance and in accordance with that understanding,

was it not? A. Yes, sir; certainly. I had nothing else in my mind than that. I don't know when Mr. Thompson first informed them that he was an executor, and about the amount that would come to them. I don't know whether he stated then that it was in bonds or not, but that was the understanding between us. It was more than an understanding. It was at his own suggestion, and I agreed to it. I have not said anything to contradict that.

On the 19th June, 1890 (Record, page 58), Thompson wrote to his co-executor:—

PHILADELPHIA, June 19th, 1890.

MY DEAR DOCTOR:—I am going to New York this morning, to settle the Saul matter in full with the board of missions, and also to get their consent to the discharge of the executors. I write to save you trouble of coming down at one o'clock, and also to ask you to call tomorrow morning at one to sign petition for discharge.

Yours truly,

H. C. THOMPSON.

At this time, and for a long time before, Thompson was hopelessly insolvent.

The manner in which Thompson obtained possession of the money of Holly, which, a few days later, was handed over by him to the missionary society, was shown by the latter, (Record, page 35), who testified:—

Q. When was the last time you employed Mr. Thompson? A. It was the time I bought the property where I reside, No. 643 North Fifteenth street. I bought it at Freeman's auction house in 1890. THE WITNESS: I went to one of the heirs and got the deed, and took it to Mr. Thompson to have the papers made out for me, and he told me that he knew all about that estate and that it was all right and that it was not necessary to have it insured, and I told him I didn't care about having it insured. Q. About what time was it that you took the deed to him? A. I think it was in May, 1890. Q. You employed him to make out the papers. A. Yes, sir. Q. State how it was that you came to hand him any money at the time, and for what purpose you handed it to him. A. I took the deed to him, as I stated before, and he said he knew all

about that property and it was not necessary to have it insured. I got that from Mr. Morgan, one of the heirs, and took the deed to Mr. Thompson, and he said he knew all about that property. I gave him the deed and told him I wanted him to make out the papers for me and have that property transferred to me. Q. Coming down now to the time when you paid him over the purchase money for settlement, state what occurred. A. I went two or three times to see if the papers were not made out, and they were not made out. They had to have them signed by some of the heirs living up in the State. The last time I went to him, he told me that the papers were ready; that everything would be right and he would have everything settled in a few days; for me to give him a check. I gave him my check; he wrote me a receipt and I left him. Of course, I didn't go near him for a time, because he had made the papers for me on two occasions before and it was several weeks, if not months, before I received the papers always—always several weeks, if not months. I think there were some of those papers two or three months before I received them after he had made out the title. Q. How much money did you pay him over, and is the receipt which I now show you the receipt for it? A. Yes, sir; I paid him a check for $12,000 on the Fidelity Trust Company. Q. (Check handed witness.) Is that the check? A. Yes, sir.

Holly's payment was made on the 19th of June. The receipt given (Record, page 6) was in these words:—

PHILADELPHIA, June 19th, 1890.

Received from James Holly, twelve thousand dollars, and J. A. Freeman's receipt of $200 to be applied to purchase of house No. 643 North Fifteenth street.

H. C. THOMPSON.

$12,000.

The associate secretary of the society (Record, page 147) swore that he had only once seen Henry C. Thompson, viz., when the check for fifteen odd thousand dollars was paid. He testified:—

× Q. Did your society give Mr. Thompson a release at that time? A. I can only answer to the best of my

knowledge and belief that I do not believe any release was given.

The same witness (Record, page 151) swore:—

And is it your impression that this check was received in part payment of a legacy from Dr. Saul? A. Yes, sir. Rd. Q. Will you kindly state what was said and done? A. My impression is that I was standing by, having been introduced to Mr. Thompson, and that when the check was handed over he intimated that he only wanted a usual receipt, as there was a balance to be paid in a short time. Rd. Q. A balance upon what? A. The Saul legacy.

Another official of the society, Roberts (Record, page 157), swore:—

Q. You were present when Mr. Thompson came with this check? A. I was. × Q. Did you give him a release? A. No, sir. × Q. What did you give him? A. Simply a business receipt. × Q. Would you take the responsibility of stating it on the record? A. Not remembering the exact words of the receipt and all the surrounding circumstances, I could not. × Q. Your recollection is that you gave him a receipt for so much money? A. Simply that and nothing more. × Q. Running in about what terms? A. Received from so-and-so so much money on account. × Q. Did he ask you for a release? A. No. × Q. Did he not present a release to you? A. He did not. × Q. How long was he with you? A. Possibly five minutes; long enough to have the receipt made out. × Q. He did not present any bonds? A. Nothing whatever. × Q. Did you ask him about any bonds? A. No. × Q. Or securities of any sort? A. No. × Q. So that practically all that passed between you was that he came in, announcing that he was Mr. Thompson, and presented this check, and you gave him a plain receipt for it, and he left? A. Exactly. × Q. That is all there was to it? A. That is all; yes. × Q. Suppose you state as nearly as you can what conversation took place between you. A. I have the original memorandum handed to me with the check. Mr. Thompson simply said, "I am "Mr. Thompson (mentioning his initials). Here is so "much on account of the Saul legacy," and he made a

check, with this memorandum, and asked me for a receipt on account. I left Mr. Thompson and went into the secretary's room, and we spoke together. I made out a receipt and handed it to Mr. Thompson, and he went out. (Memorandum offered in evidence, and marked "Respondent's Exhibit I.," of this date. Counsel for complainant takes exception to the paper in evidence on the ground that it is a paper prepared by a person not a party litigant to this action and without the knowledge of the complainant, and is not evidence against him.) By MR. BARRY: Rd. Q. Mr. Roberts, there is some memoranda of your own on that paper, is there not? A. There is. Rd. Q. Will you read the portion which is in Mr. Thompson's handwriting and which constituted the entire memoranda at the time it was received with the check? A. I do not know Mr. Thompson's handwriting, but the paper was as follows when handed to me by him:—

"ESTATE OF JAMES SAUL.

"Balance as per accounts filed	$14,927 54
"Dividends received since, not included in "account	650 00
	$15,577 54"

The same witness (Record, page 159) swore:—

× Q. Have you given all the conversation that passed between you and Thompson? A. His words were that he was simply making a payment on account. That is the impression I got. I would not like to use just his language.

The check with which Thompson paid (Record, page 9) was his own check, to the order of the society, upon the Union Trust Company of Philadelphia. It was shown that but for his deposit in the latter, of Holly's check, said check in favor of the society would not have been good. The receipt (Record, page 58) read thus:

NEW YORK, June 19th, 1890.

Received from executors' estate James Saul, late of Philadelphia, Pennsylvania, fifteen thousand five hundred and seventy-seven and fifty-four hundredths.

$15,577.54. GEORGE BLISS,
Treasurer.
Per E. WALTER ROBERTS,
Ass't Treasurer.

No release was given by the society.

Holly waited for a few weeks, supposing that his money had been properly applied, and that after the deed of the premises he had bought had been recorded, it would be delivered to him. On or about the 10th of July, 1890, Thompson left Philadelphia, to which he never returned, and in the depot at Jersey City attempted to commit suicide. (Record, page 42.)

An assignment for the benefit of creditors was made to his son, Henry C. Thompson, Jr.

Holly was unable, after he learned of Thompson's attempted suicide and flight, to obtain any information concerning the parties who had received his money. Whilst in this state of ignorance, he caused an attachment to be issued on the seventeenth day of July, 1890, under what is known as the Fraudulent Attachment Act of Pennsylvania, in which he swore that he had given the sum of $12,000 (Record, page 127) to Thompson to obtain for him a conveyance of the premises therein described in fee simple; that Thompson had fraudulently appropriated the money to his own use by causing the check to be deposited to his own credit in his own individual bank account, and thereafter by drawing out the same; that Thompson had fraudulently absconded from the city and had fraudulently disposed of his (Holly's) money with intent to defraud the latter. Later, this attachment, in 1894, was discontinued. Nothing was ever received thereunder.

On the 17th July, 1890, (Record, page 17), Holly, through his attorney, notified the society of all the circumstances connected with the use of his check by Thompson in settlement of the legacy with it.

Judge Wheeler, in the Circuit Court (Record, page 181), found:—

> Henry C. Thompson was a lawyer and real estate agent in Philadelphia, and was an executor of the estate of James Saul, of Philadelphia, and had in his hands as such about $15,000, devised and decreed to the defendant, of New York. The plaintiff gave him a check for $12,000, and a receipt for $200 advanced, to pay for a house which the

plaintiff had bargained for. He immediately deposited the check in another bank, where he had about $4000 more, gave his check on that bank to the defendant for $15,577.54, and took a receipt as "from executor's estate "James Saul" for that amount, without further specification. When the plaintiff learned where his money had gone to he demanded it of the defendant, and brought this suit to reach it. * * *

Thompson had with the plaintiff's check of $12,000 an apparent credit in the Union Trust Company of $17.158,60, and drew one check of forty-two dollars and another of fifty dollars on the same day that he drew the check for the defendant, but whether either or both before or after that one does not appear, but if after, he had an apparent credit not drawn against of $17,066.60, which would leave $1489.06 after that check of $15.577.54 was drawn, and which might as well be a part of the plaintiff's as of any other money, and that a[illegible] of other money as well drawn against as the plaintiff's, [illegible]t, if all was so, the check must have been drawn against at least $10,326.94 of the plaintiff's money. Afterwards but $104.35 was deposited and a check of $507.58 was drawn, and with these two checks of forty-two dollars and fifty dollars paid before the check to defendant was paid, and after that was paid a balance of $885.35 was left to the credit of Thompson. These checks may as well have been paid from, and this balance as well left of, the plaintiff's as any other money, and so reckoning them all, there still remains $10,028.82 of the money that went to the defendant, which came directly from, and belonged to the plaintiff. This tracing accords to the defendant full advantage of the fact that neither money itself nor bank credit for money has any earmarks, and puts upon the plaintiff the burden of showing what of his money must actually have come into the hands of the defendant by allowing for all that from want of earmarks or confusion of credits may have in any manner gone elsewhere."

The Circuit Court of Appeals for the Second Circuit, through Judge Wallace (Record, page 194), found:—

The complainant employed Thompson as an attorney and conveyancer about the purchase of certain real estate, and June 19th, 1890, delivered to him a check for $12,000 with instructions to apply the proceeds to the payment

of the purchase money. Instead of doing so, Thompson used the check as a credit item in his account with the Union Trust Company, and misappropriated the proceeds by checks drawn by him on the trust company. Among these check was one dated June 20th, 1890, for $15,577, payable to the order of the missionary society.

Thompson was one of the executors of the estate of James Saul, under whose will the missionary society was a legatee. A decree of the probate court having jurisdiction in the premises had been entered in November, 1889, settling the accounts of the executors and ordering payment of the legacy. Thompson's co-executor was a clergyman, and had left the administration of the estate and the control of the funds exclusively to Thompson; and the missionary society was cognizant of the facts. In the spring of 1890 the missionary society became urgent for the payment of the legacy, wrote several letters to Thompson about it, and also wrote to his co-executor. The latter informed the missionary society in substance that the delay in paying the legacy was solely attributable to Thompson's dilatory disposition. His patience finally seems to have become exhausted, and he insisted that Thompson should produce the securities of the estate for his examination, and fixed a day for that purpose. On that day, before the time appointed, he received a note from Thompson stating that he was going to New York to settle with the missionary society. The next day Thompson called at the office of the missionary society and delivered to its treasurer the check for $15,577, the amount being the sum due as principal and interest upon the legacy. The missionary society accepted the check in payment, receipted for the amount to the executors, and shortly thereafter collected the check. According to the finding of the court below this check was to the extent of $10,028, paid by the Union Trust Company out of the moneys realized from the check of the complainant. The court below decreed against the missionary society for that amount in favor of the complainant.

Judge Wheeler entered a decree in favor of the plaintiff for the sum of $10,028.82, with interest, because of his having found that the money paid to the society belonged to Holly, and that no new transaction had arisen between the society and Thompson after the crediting of the check.

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The specifications of error relied on are as follows:—

1. The learned Circuit Court of Appeals erred in decreeing that the decree of the Circuit Court, which was in the words following, should be reversed:

"Adjudged and decreed that the complainant, James Holly, do recover of the respondent, the Domestic and Foreign Missionary Society of the Protestant Episcopal Church of the United States of America, the sum of $\$10{,}028\frac{82}{100}$, with $\$4{,}641\frac{62}{100}$ interest thereon from the nineteenth day of July, 1890, amounting to $\$14{,}670\frac{44}{100}$, together with costs."

2. The learned Circuit Court of Appeals erred in remanding the cause to the Circuit Court with directions to dismiss the bill with costs.

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The Circuit Court of Appeals reversed his decree and ordered the bill to be dismissed because of a principle thus stated (Record, page 196):—

> He who receives money or acquires negotiable paper in payment of a debt is a holder for value, and if he receives the money innocently or acquires the commercial paper before its maturity and without notice of any infirmity, has a perfect title which cannot be subordinated to the equities of any third person.

ARGUMENT FOR APPELLANT.

In view of our claim that the transaction connected with the payments to the society of Thompson's check was not one in the course of business, that no value was given and that no debt was paid therewith, we have stated very fully the facts, practically undisputed, of the case. Before entering upon the argument of what we deem to be the vital point, we will briefly advert to a few matters argued by the appellee in the lower court, but not there accepted as of importance.

It was claimed that by virtue of the proceeding in fraudulent attachment, Holly had elected to treat Thompson as his debtor. The purpose of this proceeding, however, was to attach any property of Thompson's which could be seized by the Sheriff. It rested upon an affidavit which disclosed the fraud Thompson had committed, but abandoned no rights possessed by the appellant. At the time the attachment was taken out, Holly did not know where his money had gone. Under the laws of Pennsylvania the fraud perpetrated upon him gave him a right to recoup himself out of any property of Thompson he could find. The attempt so to recoup, especially in view of the fact that all of his money had not been used by Thompson, abandoned neither his right to his money, nor to follow it wherever it could be found.

The appellee was not, and could not be misled, because on the seventeenth day of July, 1890, as soon as Holly learned it had received a part of his money, it was advised of the fact and was asked to make return thereof.

There was no element of waiver or of election in the unsuccessful effort made by Holly to indemnify himself out of Thompson's property, against the consequence of the fraud the latter had perpetrated. The discontinuance of the abortive proceedings put an end to them and to any possible sequence thereof. Under any circumstances, the attachment must have failed, as there had been a prior assignment for the benefit of creditors by Thompson.

The doctrine of a conclusive election of one of several remedies by personal action, rests on an equitable estoppel, but at any time previous to an adjudication the plaintiff may discontinue the first action and proceed with the second.

Johnson *vs.* Frew, 33 Hun. (N. Y.), 193.

> A vendor of goods, the sale and delivery of which was induced by fraud on the part of the vendee, does not by an effort to retake the entire property, which is successful in part only, lose the right to pursue the vendee for the value of the unfound portion; nor is the effort a defense to an action to recover possession against one in whose hands a part is found.

Powers *vs.* Benedict, 88 N. Y., 605.

> An action by a vendor against a fraudulent vendee for the price of goods, if discontinued before judgment, does not prevent an action of trover against a purchaser thereof.

See opinion by Smith, J., in Equitable Co-operative Foundry Co. *vs.* Hersee, 33 Hun., 169.

In Loeb *vs.* Willis, 100 N. Y., 231, 235, citing Bigelow on Estoppel, it is said:—

> By the discontinuance of an action the further proceedings in the action are arrested not only, but what has been done therein is also annulled, so that the action is as if it never had been. If a suit be discontinued at any stage, * * * it is not an estoppel or bar in any sense.

In Webb *vs.* Buckalew, 82 N. Y., 555, citing Carlisle *vs.* McCall, 1 Hilt., 399; Audubon *vs.* Excelsior Ins. Co., 27 N. Y., 216, it is said:—

> Where the litigation has ended in a discontinuance, * * * so that an actual decision on the merits has not been reached, * * * the proceedings have no conclusive character and cannot operate as a bar.

In Lloyd *vs.* Brewster, 4 Paige Ch., 537, cited by appellants, the syllabus reads thus:—

> If a vendor who has been defrauded in the sale of his goods proceeds *to judgment* against the vendee upon the contract of sale after he is apprised of the fraud, his election is determined.

In Mattlage *vs.* Poole, 15 Hun. (N. Y.), 556, an action was brought against both an agent and his undisclosed principal for goods sold to the agent and used by the principal. It was held that so long as no judgment was entered, the plaintiff's act in suing both did not constitute an election to hold the principal and to discharge the agent.

In Bach *vs.* Tuch, 47 Hun. (N. Y.), 536, an action was commenced by attachment to recover the price of goods. Afterwards an action was instituted for the recovery of the goods on the ground that they had been obtained by false representation. *Held*, that the commencement by attachment did not preclude the subsequent action, it not appearing that the attachment was begun with the knowledge of the falsity of the representation.

In Conrow *vs.* Little, 41 Hun. (N. Y.), 395, A. obtained plaintiff's goods by means of a forged note. When plaintiff learned of the forgery he sued A. and obtained an attachment. Then, learning that A. had transferred the goods to B., plaintiff discontinued and sued B. It was held that the action against B. was maintainable.

In Hays *vs.* Midas, 39 Hun. (N. Y.), 460, A. was induced by B.'s false and fraudulent representations to sell goods to him. A. began suit on contract and attached the goods. Fifteen other attachments preceded A.'s. A. discontinued

and began a replevin suit to recover the goods. There was no evidence that when A. began his attachment suit he knew of the fraud. It was held he could maintain his replevin suit.

In Fowler *vs.* Bowery Savings Bank, 113 N. Y., 450, 455, W. deposited money with the defendant savings bank in trust for his wife E. The pass book read: "In account with W. "for E." Afterwards both W. and E. died, and plaintiff, E.'s executor, demanded the deposit of defendant. W.'s executor presented the pass book and received the deposit. *Held*, that plaintiff, by suing W.'s executor for the amount of the deposit, ratified the payment to him, and having then exercised his election, could not afterward maintain an action therefor against the bank. Earle, J., said:—

> If the money had been absolutely the money of the plaintiff, left on special deposit with the bank, then he could have pursued the money wherever he could trace it without losing his remedy against the bank. In such a case the plaintiff would not be barred of his right of recovery against the bank until he had either recovered his money or the value of the same. All his remedies would be consistent, being based upon the theory of a wrongful disposition of his property.

See also Nat. Bank *vs.* City Bank, 103 U. S., 668.

Another claim in the court below was to the effect that there was no competent evidence to show that any of Holly's money went into the possession of the missionary society. This claim rested upon an assertion that the books of Thompson as produced and offered in evidence were, as regarded the society, hearsay, and therefore incompetent and inadmissible.

The books offered in evidence were those which Thompson had kept to show his dealings with the trust. The findings of the Circuit Court and of the Circuit Court of Appeals are conclusive as to the fact that Holly's money, to the extent of $10,028.82, went directly to the society. Holly's check for $12,000, without the knowledge of Holly, went, on the 19th June, 1890, to Thompson's individual credit in the Union Trust Company. Without use of at least $10,028.82 of the

proceeds thereof, the check by Thompson upon the Union Trust Company would not have been good. On the 19th June, 1890, Thompson's check on the Union Trust Company was delivered to the society. It would be a waste of time to discuss a question of fact conclusively established in favor of the appellant by the Circuit Court and by the Circuit Court of Appeals.

Another claim was set up in the court below, to the effect that the missionary society had paid out all the moneys it received on the nineteenth day of June, 1890, antecedently to the notice given to it by Holly on the seventeenth day of July, 1890. It appeared, however, that independently of the amount received from Thompson, there had stood to the credit of the society in its bank, at all times between the nineteenth day of June and the seventeenth day of July, 1890, a sum derived from independent sources in excess of $18,000.

If the fact had been otherwise, however, it would have been immaterial. The society could not excuse itself for the use of Holly's money by saying it had expended it in and about its purposes.

On the twentieth day of June, 1890, there was a balance to the credit of the society in the National Bank of New York of $43,569.83. On the same day Thompson's check was deposited, with a small additional amount, and at the end of the day the balance in bank was $60,110.09. Between the twentieth day of June and the eighteenth day of July, 1890, both inclusive, the society had received and deposited additional sums of money amounting to $45,265.81, making a total, including the amount on deposit on the twentieth day of June, of $105,375.90. Checks had been drawn during this interval of time to the amount of $74,663.96, which left a balance in bank to the credit of defendants on deposit on the nineteenth day of July, 1890, the day after receiving Holly's notice, of $30,711.93. At no time during the interval was the balance to the credit of the society less than the sum we have named.

Having made these preliminary observations, we will deal with the vital question raised by this record.

If the decree of the Circuit Court of Appeals be not reversed, a great hardship will be inflicted upon Holly, the appellant, who will have involuntarily contributed, to an extent far beyond either his inclination or his means, to missionary work, and the appellee, entitled as a residuary legatee to an estate which did not exist, will be allowed to retain his money, received by it in the belief that such money was an asset of said estate. This retention will be permitted despite the fact that no consideration of any sort or kind was given for Holly's money in the way of discharge of a debt, or otherwise. It is not pretended, and it could not be pretended, that by reason of Thompson's payment the society was prevented from otherwise collecting from him the misappropriated funds of the estate. Within a month after the transaction Thompson was a fugitive, attempting suicide, leaving behind him assets worth about $2500 with which to pay an indebtedness of over $100,000.

The case, in brief, presents this aspect: Thompson, a defaulting trustee, replaced the amount he had misappropriated, by converting money entrusted to him by a client for a specific purpose, and by paying to the *cestui que trust* the amount thus replaced. In this transaction Thompson, as trustee, acted on behalf of the trust estate. All interested in the trust estate, including the society, took the benefit of the wrongful act of their trustee, charged with the knowledge he possessed. We formulate, in the shape of a proposition, the point we make.

The executors of Saul paid the moneys of Holly to the missionary society, which gave no value therefor. Holly is therefore entitled to demand a return of his moneys.

Even in the case of a payment of his debt by an insolvent with stolen or misappropriated moneys or negotiable paper, a great hardship is done to the real owner of the money or negotiable paper stolen or misappropriated, without any neglect on his part.

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Where a man whose name is upon commercial paper, indorses or assigns to another, though it may also be a hardship upon him if, subsequently, he is compelled to pay what he made or indorsed, in favor of those relying innocently upon his act, yet he suffers from the result of his own action. He has not much moral right, as against a third person receiving the paper upon the faith of his execution, indorsement or assignment, to escape from the legal consequences of appearances created by himself. In defending against those who ask him to respond to his making or indorsing of commercial paper, he is compelled to admit that upon the face of the paper he is responsible, and is obliged to ask to be relieved because of some fraud perpetrated by another to whom he had furnished the means of doing injury. As against a third person, ignorant of the fraud or the misuse, there is every reason why he whose act brought about the opportunity to deceive, shall bear the ill results.

An assignor seeking to escape from the effect of his assignment, conceding that upon the face of the instrument he is liable, asks that an innocent person who relied upon his act shall suffer, rather than that he shall do so.

The principal, however, who hands money to his agent to to be delivered upon a specific account to a designated person, does nothing which either vests, or appears to vest, a title in his agent. The receiver of such money, if the same be misappropriated by the agent, can appeal to no act of the principal which, upon its face, appeared to convey the title. Under such circumstances, it is a hardship upon the principal whose money is misappropriated, to allow such receiver to profit by the misappropriation. Such profit should only be permitted because of some imperative necessity of business or commerce. Two things are absolutely essential under either exigency, to enable the receiver to retain misappropriated property, viz., ignorance of the fact of misappropriation and the giving of value. It does not follow that the full value must be given, though any considerable inadequacy of value would justify a finding of *mala fides*.

The *bona fides* of the person receiving the misappropriated

property and the giving of value, are not sufficient to entitle him to retain as against the real owner, all kinds of property, but only certain kinds, such as money and negotiable securities.

Courts, finding themselves compelled either to hamper business transactions by imposing upon innocent purchasers for value, taking negotiable securities or money in the ordinary course of business, a liability to respond to the real owner or to promote such transactions even at the expense of depriving the owner of his title, have determined it to be essential to allow business to be done with safety under ordinary circumstances, even though the innocent owner must suffer.

Whether the payment of an antecedent debt does, or does not, constitute the giving of value, is a question concerning which courts have differed; but this court has long ago settled the Federal law which governs the subject. It has, however, required that the transaction which will give immunity must be one in the ordinary course of business and must amount either to payment or collateral securing such debt.

Under the law as settled by this court, even in the case of misuse of negotiable securities in paying, or in collaterally securing, an antecedent debt, the necessary conditions, prerequisites to a divestiture of the title of the real owner, are (1) the existence of a debt, and (2) the paying, or collaterally securing, the same. If there be no debt, there is, of course, no foundation for the divestiture. If, though there be a debt, it is not paid, or collaterally secured, the creditor can not retain the property of another. Whilst some of the courts have held that the creditor does not necessarily injure his position by the acceptance of the misused negotiable securities from an insolvent debtor, this court has held that merely by reason of the fact of accepting payment or accepting collateral security, the position of the creditor might have been affected. It therefore assumes that it was.

In the present case, we need not bother with any question of collateral security, because none was offered. We deal simply with the question of whether or not there was a payment.

Was there a debt owing by the estate of Saul to the missionary society? If aye, was such debt paid with Holly's money? We contend that the transaction was not in the ordinary course of business; that no debt existed; and that there was no payment, or attempt to pay, a debt owing to the missionary society by any person who stood towards it in the relation of a debtor. In order that what is said under this head may be read in connection with the facts, we made the elaborate statement constituting the first part of our brief.

(*a.*) THE ESTATE OF SAUL WAS NOT A DEBTOR TO THE MISSIONARY SOCIETY.

Saul bequeathed his residuary estate to the society. It consisted of the securities we have specified. The residuary legatee was entitled to nothing saving that which would remain after the administration of the estate and after the payment of its debts and expenses. Thompson, anterior to the time of filing the account of the executors in the Orphans' Court of Philadelphia, had sold the securities and had misappropriated the proceeds. No estate was left. The other executor and the residuary legatee, were ignorant of the fact that the estate had been wasted. They supposed the securities still remained on hand. The account of the executors was filed in which it was stated that the estate, as per the original inventory, was in hand (Record, page 179), less certain amounts which had been paid thereout. The Orphans' Court adjudicated the account upon the mistaken idea that the securities still remained with the executors, and that the estate was intact. It ascertained the amount of the residuary estate as it supposed the same to exist, and awarded the same to the residuary legatee. After this adjudication, Thompson's co-executor supposed the securities still remained in hand, and so assured the residuary legatee. Co-executor and legatee were under the impression Thompson was dilatory in delivering the securities that had been awarded, not that they had been sold. Thompson, after he had obtained possession of Holly's money, went to New York and handed his personal check, drawn against the latter, in settlement of the award. The receipt given was to the

executors of the estate for what was then supposed, by the officers of the society, to come from and to constitute the estate. The society did not know Holly's money had been used. It supposed the estate consisted of securities. No explanation was asked of the fact that Thompson delivered, not the securities, but the value thereof. We are bound to presume that knowing as it did that the executors could sell the securities, the officers of the society supposed they had done this, and that they were delivering to them the proceeds of sale of securities which belonged to the estate. By reason of his embezzlement, Thompson and his co-executor might have been held responsible to the estate, by reason of the fraud of the one and the negligence of the other, for the loss. The remedy, however, which would have been open to the society in case it had been informed of the embezzlement and loss, would not have been a direct one. There had been no decree finding the fact of embezzlement or of loss, nor one ordering Thompson and Watson to pay anything individually to the society. In the belief that the estate was intact, the Orphans' Court had directed the executors to pay the estate to the owner, viz., the residuary legatee. The executors delivered to the latter, not the estate which had been awarded to it, which was really non-existent, but the money of Holly.

The missionary society accepted the check paid to it by Thompson under the mistaken idea that it represented the proceeds of sale, by the executors, of the securities to which it was entitled. As we have said, the estate owed it nothing and the executors were not supposed to pay, and did not pretend to pay, their own funds, in liquidation of an indebtedness neither known to exist nor taken into consideration nor dealt with.

Saul, by his will, did precisely what he would have accomplished in his lifetime by a donation. He gave his residuary estate, consisting of certain securities, to the society. No value, of course, was paid by it therefor. The executors were practically in the position in which a messenger would have been placed had Saul in his lifetime intrusted the securities to him, to be handed to the society. In the latter case, if the

messenger had lost or misappropriated the bonds and had delivered in place thereof, the bonds or money of some other person, the society could not have retained such bonds or money as against the rightful owners, inasmuch as it would have given no value therefor.

Would it be contended, if the Orphans' Court had specifically awarded, as constituting Saul's residuary estate, certain designated securities, that if Thompson had handed to the society certain other negotiable securities of like value, belonging to Holly, the society could have retained the latter? In what respect is the case before the court different from the one we have put? The estate consisted of securities. The thing handed to the society was supposed by it to be money derived from the sale thereof, but, in reality, it was money derived from Holly.

The provisions of the Pennsylvania statutes upon the subject of distribution of the estates of decedents, are to be found in 1 Pepper & Lewis Digest, 1521–2. They are embodied in the Act of 24th February, 1834, and run thus:—

> No administrator shall be compelled to make distribution of the goods of an intestate until one year be fully expired from the granting of the administration of the estate. Whenever distribution as aforesaid shall be required by any person interested, the administrator shall present, to the Orphans' Court having jurisdiction of his accounts, a statement of all demands against the estate, which have been made known to him, and after deducting the amount thereof from the assets in his hands, together with such further sum as may be necessary to pay the interest and costs of suit of such as may be in dispute, and of such as he may deem it his duty to dispute, make distribution of the residue under the direction of the Orphans' Court aforesaid. * * * Before any person shall be entitled to receive any share in the distribution, as aforesaid, he shall give sufficient real or personal security, to be approved of by the Orphans' Court, having jurisdiction, as aforesaid, in such sum and form as the said court shall direct, with condition that if any debt or demand shall afterwards be recovered against the estate of the decedent, or otherwise be duly made to appear, he will refund the ratable part of such debt or de-

mand, and of the costs and charges attending the recovery of the same; but if the person or persons entitled to receive the same, is or are unable to give the security aforesaid, then the money shall be put at interest, on security approved by the Orphans' Court, which interest is to be paid annually to the person entitled to it, and the money to remain at interest until the security aforesaid is given, or the Orphans' Court on application, shall order it to be paid to the person or persons entitled to it. Executors after one year elapsed from the granting of the administration of the estate, upon the requisition of any residuary legatee, or any other person interested, shall pay and deliver, under the direction of the Orphans' Court having jurisdiction of their accounts, all such legacies as are due and payable by them, or a proportionate part thereof, first deducting all demands against the estate and such further sums as may be necessary to pay the interest and costs of such as are disputable or in dispute; and if there shall be a residue distributable under the intestate laws of this Commonwealth, they shall also distribute the same; and the proceedings in any such case shall, in all respects, whether of security or otherwise, be the same as are hereinbefore provided in the cases of distribution by administrators of the estates of decedents intestate, so far as the nature of the case will permit.

The Rules of the Orphans' Court of Philadelphia County, *inter alia*, provide:—

When an account is called for audit, there shall be handed to the auditing judge, to be annexed to the adjudication, a statement or petition, verified by affidavit, setting forth the date of decedent's death, the names and relationship of the persons who claim a share in the distribution and the manner in which their interest arises. * * * After a judge of the court shall have filed in the office of the clerk his adjudication, showing the adjustment and settlement of an account, and a decree of distribution when necessary, any parties excepting to the same must file their exceptions with the clerk and furnish a copy of the same to the judge who audited the account, at any time on or before the third Saturday following. The argument upon such exceptions will be heard by the court, when sitting to hear cases on the argument list. If the exceptions are not filed within the time limited, the adjudication will become absolute. * * *

> All applications to enforce a decree or adjudication for the payment of costs or any other sum of money, or for the delivery of any goods, chattels or other property of an estate, by an executor, administrator, guardian or trustee, shall be by petition of the person or persons entitled to the same, briefly setting forth the facts upon which such application is based. If the same be satisfactory to the court, a peremptory order to pay or transfer, assign or deliver, as the case may be, will be granted; a certified copy of which must be served personally upon the respondent at least ten days prior to the day named in the order. And if the order of the court be not complied with on or before the day so named, upon proof of personal service of the order, an attachment will, upon petition setting forth the necessary facts, be awarded.

It will be observed that the duty of the executors of an estate in Pennsylvania, after the completion of the administration, is to distribute, to residuary legatees, if there be such, the amount of the residuary estate. The adjudication by the Orphans' Court of the accounts of such executors, amounts to a decree ordering the delivery of the estate to the residuary legatees. Under the situation as it was supposed to exist when Thompson handed Holly's money to the missionary society, it had been decreed that he should deliver to the latter, not his own estate, nor that of Watson, but that of Saul. This estate was what he was supposed to deliver, for which a receipt was given. There was no decree that either executor should pay anything personally. Their relation under the decree was not that of debtors, but of trustees, bound to deliver the trust estate, donated by Saul, to the *cestui que trust*. The missionary society was a volunteer entitled to the estate thus donated. The executors were the instruments of administration and of distribution. What was done by Thompson was supposed by the recipient to constitute a delivery to the donee of the estate donated.

(*b*.) IT WAS FROM THE ESTATE OF SAUL THE MONEY RECEIVED BY THE SOCIETY, WAS ASSERTED TO BE PAID.

The receipt which was given was to the executors of the estate, not to the individuals. It was given for what purported to have come from the estate and to be a part thereof.

(*c.*) THE MONEY HANDED BY THOMPSON TO THE MISSIONARY SOCIETY WAS NOT, UNDER ANY ASPECT, THE PAYMENT OF A DEBT.

We have already endeavored to show there was no debt owing by the estate, and therefore it follows, if we are right in our contention, there could have been no payment of a debt. If it be claimed that the society would have had the right to proceed against the defaulting executors, as individuals, because they had failed to distribute the estate, it is sufficient to say, by way of reply, that no such right was asserted, and there was no pretense that Thompson was endeavoring to settle his liability as a defaulter. No one, saving Thompson, knew there had been any default. Everybody else supposed the estate was intact.

It is not necessary to consider what the right of the missionary society in the way of retention of Holly's money, would have been, if Thompson had stated to them he was in default, and had agreed to meet his liability by payment with his check. Had he done this, it might with some slight plausibility have claimed he had established a debtor relation and had paid his liability.

The receipt given to him shows the understanding of the parties as to what was done. It runs thus (Record, page 58):—

NEW YORK, June 19th, 1890.

Received from Executors' Estate James Saul, late of Philadelphia, Pennsylvania, Fifteen thousand, Five hundred and seventy-seven Dollars and Fifty-four hundredths. $15,577.54

GEORGE BLISS,
Treasurer.
Per E. WALTER ROBERTS,
Ass't. Treasurer.

No release was given. The liability of Thompson to make good his default remained, after this payment, precisely as it existed antecedently thereto. It was not in the least affected or intended to be affected.

Thompson stood towards the missionary society in two relations: (1) that of an executor holding an estate, subject to

the duty of delivery of the same to the owner, and (2) that of an individual, bound in case of his inability to deliver the same by reason of his default, to respond to those interested. It was with him as a trustee alone the society dealt. Immediately after the giving of the receipt, upon learning the estate had not been really delivered to it, proceedings could have been taken against the executors as well as against the individuals.

Where, in the ordinary course of business, a debt is paid, the creditor has discharged his claim and has no right of action against his former debtor, until the transaction involved in the payment and release is canceled. Had the missionary society learned, subsequently to the giving by it of its receipt, that the executors had made waste of the assets of the estate, they could have proceeded at once to enforce whatever individual liability existed, because, in ignorance that there had been any such, they had not professed to give, and had not given, any discharge thereof.

By reason of an innocent mistake on the part of the missionary society, whose officers supposed they were receiving the residuary estate of Saul, the money of Holly came into its possession. For this money it gave no value and canceled no debt.

What was done was analogous to what would have occurred had a negotiable bond, really lost, belonging to the estate of Saul, been decreed to be handed over to the missionary society as residuary legatee, and had the executor delivered to the residuary legatee a negotiable bond belonging to some one else, issued by the same corporation.

This court, solely for the purpose of enabling business to be done without too much danger, has permitted a creditor, receiving from his debtor the negotiable securities of a third person, in payment of the indebtedness of the latter, to retain the same. The transaction we have been considering was not in any sense a business transaction, but was different from those in which the rule has heretofore been applied, and was not one requiring the application of the rule demanded by business exigencies. Why should Holly's money be allowed to be re-

tained by the missionary society because an executor, utterly insolvent, and about to abscond, saw fit to substitute the same for an estate which had been lost? By virtue of its receipt of the money the missionary society was not in any way prejudiced; was induced to give no release of indebtedness, and remained in precisely the same position it occupied antecedently.

In Thompson *vs.* Sioux Falls National Bank, 150 U. S., 231, a Bank, knowing that the county treasurer of the county had not sufficient county funds in his hands to balance his official accounts, consented to give him a fictitious credit in order to enable him to impose upon the county commissioners, who were about to examine his accounts. They accordingly gave him a cashier's check for $16,571.61, which he indorsed and took to the commissioners. They received it, but refused to discharge him or his bondsmen, and placed the check and such funds as he had in cash in a box and delivered them to his bondsmen. The latter deposited the money and the check in another bank in the same place, which bank brought suit against the bank which issued the check to recover upon it.

Held:—

(1.) That the circumstances under which the check was issued were a plain fraud upon the law and also upon the county commissioners;

(2.) That their receipt of it and turning it over to the sureties was a single act, intended to assist the sureties in protecting themselves, and was inconsistent with the idea of releasing them from their obligation.

In Stephens *et al. vs.* Olson, 64 N. W. Rep. 899, the Supreme Court of Minnesota, in defining an "innocent purchaser," used this language:—

> The term, "innocent purchaser," in this statute as meaning a *bona fide* indorsee or bearer, within the law merchant; in other words that, to come within the protection of the statute, a party must have acquired the paper "in the due course of business," or, as sometimes expressed, "according to the usages and customs of "commercial transactions in commercial paper."

In Railroad *vs.* National Bank, 102 U. S., 23, this court, whilst holding that a person receiving negotiable securities might hold the same where delivered in payment of, or as security for, a pre-existing debt, said —

> Assuming it to be true (which, however, may well admit of some doubt from the generality of the language) that the holder of a negotiable instrument is unaffected with the equities between antecedent parties, of which he has no notice, only where he receives it in the usual course of trade and business for a valuable consideration, before it becomes due, we are prepared to say that receiving it in payment of, or as security for, a pre-existing debt is according to the known usual course of trade and business.

In Wilson *vs.* Smith, 3 Howard, 763, 769, this court said :—

> We think the question certified has been settled by the decision of this court, and that it is unnecessary to go into an examination of the English laws which were cited in the argument. It is admitted that the bill was the property of the plaintiff, and was transmitted to St. John, at Augusta, for collection, and by him transmitted to the defendant, at Savannah, where the drawer resided; and that no consideration was paid for the bill, either by the defendant or St. John. According to the usual course of dealing among merchants, the transmission of the paper to St. John gave him an implied authority to send it for collection to a sub-agent at Savannah, for it could not have been expected by the plaintiff that St. John was to go there in person, either to procure the acceptance of the bill or to receive the money, nor could St. John have so understood it. So far, therefore, as the question of privity is concerned, the case before us is precisely the same with that of the Bank of the Metropolis *vs.* The New England Bank, 1 How., 234. In that case, the bills upon which the money had been received by the plaintiff in error, were the property of the New England Bank, and had been placed by it in the hands of of the Commonwealth Bank for collection, and were transmitted by the last-mentioned bank to the Bank of the Metropolis, in Washington, where the bills were payable. And upon referring to the case, it will be seen that the court entertained no doubt of the

right of the New England Bank to maintain the action for money had and received against the Bank of the Metropolis; and the difficulty in the way of its recovery in the action was not a want of privity, but arose from the right of the Bank of the Metropolis to retain, under the circumstances stated in the case, for its general balance against the Commonwealth Bank. In that case, as in the present, the agent transmitting the paper appeared, by the indorsements upon it, to be the real owner, and the party to whom it was transmitted had no notice to the contrary, and the money received was credited to the Commonwealth Bank. We think the rule very clearly established, that whenever, by express agreement between the parties, a sub-agent is to be employed by the agent to receive money for the principal, or where an authority to do so may fairly be implied from the usual course of trade or the nature of the transaction, the principal may treat the sub-agent as his agent, and when he has received the money, may recover it in an action for money had and received.

Another question has been raised in the argument, that is, whether the defendant has a right to retain on account of the money due to him from St. John? As this point has not been certified, it is not regularly before the court, yet as it has been fully argued on both sides, and evidently arises in the case, it seems proper to express our opinion upon it, as it may save the parties from further litigation and expense.

Upon this part of the case, as well as upon the question certified, we think the case of the Bank of the Metropolis *vs.* The New England Bank decisive against the defendant. It appears from the statement that he made no advances and gave no new credit to St. John on account of this bill. He merely passed it to his credit in account. Now, if St. John had owed him nothing, upon the principles we have already stated, the plaintiff would be entitled to recover the money; and we see no reason why he should be barred of his action because St. John was debtor to the defendant, since the case shows that he incurred no new responsibility upon the faith of this bill, and his transactions with St. John remained in all respects the same as they would have been if this bill had never been transmitted to him. In the case of the Bank of the Metropolis and The New England Bank, it appeared in evidence that there had for a long time been

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mutual dealings between these two banks in the collection of money for each other, and that balances were suffered to remain and credit given upon the faith of the paper transmitted or expected to be received, according to the usual course of their business with one another. And the court held, that if credit had been so given, the party giving it had the same right to retain as if he had made an advance of money, the hazard he ran by the extension of the credit giving him as just and equitable a right to retain as if he had incurred responsibility by an advance of money. The right to retain, in that case, depended upon the fact that credit was given. But in the case at bar this fact is expressly negatived, and there is no ground, therefore, upon which he can retain, according to the principles decided in the case referred to.

In People's Savings Bank *vs.* Bates, 120 U. S., 556, this court said:—

> It is insisted that the principles announced in Swift *vs.* Tyson, 16 Pet., 1, and the Railroad Co. *vs.* National Bank, 102 U. S., 14, sustain the proposition that the bank was a mortgagee in good faith, although the mortgage to it may be held to have been given merely as security for past indebtedness. The general doctrine announced in Smith *vs.* Tyson was that one who becomes the holder of negotiable paper before its maturity, in the usual course of business and in payment of an existing debt, is to be deemed to have received it for a valuable consideration, and is therefore unaffected by any equities existing between antecedent parties. In that case, Mr. Justice Story said that the rule was applicable as well as when the negotiable instrument was received as security for, as when received in payment of, a pre-existing debt. In Railroad Co. *vs.* National Bank it was held, conformably to the recognized usages of the commercial world, that "the transfer before maturity of negotiable "paper as security for an antecedent debt merely, without "other circumstances, if the paper be so indorsed that "the holder becomes a party to the instrument, although "the transfer is without express agreement by the cred-"itor for indulgence, is not an improper use of such "paper, and is as much in the usual course of commer-"cial business as its transfer in payment of such debt. "In either case, the *bona fide* holder is unaffected by

"equities or defenses between prior parties of which he "had no notice." (Page 28.)

Do these principles apply to the case of a chattel mortgage given merely as security for a pre-existing debt, and in obtaining which the mortgagee has neither parted with any right or thing of substance nor come under a binding agreement to postpone or delay the collection of his demand? Upon principle, and according to the weight of authority, this question must be answered in the negative.

The rules established in the interests of commerce to facilitate the negotiation of mercantile paper, which, for all practical purposes, passes by delivery as money, and is the representative of money, ought not, in reason, to embrace instruments conveying or transferring real or personal property as security for the payment of money. At any rate, there is nothing in the usages of merchants, as shown in this record, or so far as disclosed in the adjudged cases, indicating that the necessities of commerce require that chattel mortgages be placed upon the same footing in all respects as negotiable securities which have come to the hands of a *bona fide* holder for value before their maturity. Such a result, if desirable, must be attained by legislation, rather than by judicial decisions.

One of the earliest cases in the Federal Courts upon this subject is that of Morse *vs.* Godfrey, 3 Story, 364, 389. It there appeared that one Reed mortgaged to Godfrey all stock in trade and nearly all his real estate. The latter subsequently mortgaged the same property to a bank. In a contest between the bank and the assignee in bankruptcy of Reed, the former claimed to be a *bona fide* purchaser for value without notice of the invalidity, under the bankrupt law, of the mortgages to Godfrey. Mr. Justice Story said :—

"This leads me to remark that the bank does not stand "within the predicament of being a *bona fide* purchaser "for a valuable consideration, without notice, in the sense "of the rule upon this subject. The bank did not pay "any consideration therefor, nor did it surrender any "securities or release any debt due, either from Reed or "Godfrey, to it. The transfer from Godfrey was a simple "collateral security, taken as additional security, for the "old indebtment and liability of the parties to the notes "described in the instrument of transfer. It is true that "as between Godfrey and Reed and the bank, the latter

"was a debtor for value, and the transfer was valid. But "the protection is not given by the rules of law to a "party in such a predicament merely. He must not only "have had no notice, but he must have paid a consideration "at the time of the transfer, either in money or other "property, or by a surrender of existing debts or securi- "ties held for the debts and liabilities.

"But here the bank has merely possessed itself of the "property transferred as auxiliary security for the old "debts and liabilities. It has paid or given no new con- "sideration upon the faith of it. It is, therefore, in truth, "no purchaser for value in the sense of the rule."

In Decan *vs.* Shipper *et al.*, 35 Penna., 239, 243, a case which has been quoted approvingly by this court, it was said:—

It has been long well settled, that a bill of lading, "reg- "ularly, fairly, and for value indorsed to another, will "pass the title" to the goods to the indorsee. Schumacher *vs.* Eby, 12 Harris 521, and the cases there cited.

The question here, however, is not this, but whether a fraudulent consignee or holder of a bill of lading can pass a title to the goods in such bill to a purchaser for value without notice of the fraud? or, in other words, whether he can give title by indorsement of the instrument, when he has none himself? That is the aspect in which we may certainly consider this case, although there might, perhaps, be another in which the *bona fides* of the indorsee is questionable. The holder of the bill of lading procured the grain from the plaintiffs, on the fraudulent representation that he was purchasing it for Alburtis, the indorsee, and that it was to be paid for in cash. Under this false pretense, he procured the delivery to be made, and had it shipped to his own order, and then, by indorsement of the bill, procured an advancement to be made to him by Alburtis. The plaintiffs never sold or parted with their title to him as purchaser, and it was fully shown that he was not authorized to purchase for Alburtis. So that the possession was clearly fraudulent As soon as the plaintiffs discovered this, and before the vessel sailed, they demanded the redelivery of the grain from the master, and on refusal brought this action of trover to recover the value. The master defends on the title of Alburtis, under the indorsement of the bill of lading. Can he successfully do so?

> We think not. The point thus involved has been elaborately investigated in recent English cases, and it has been held that by the assignments of a fraudulent holder, of delivery orders for goods in store (instruments of the same commercial nature as bills of lading), where the possession of the goods was never intended to be passed by the vendor to such holder, no title passed to a party making advancements on the faith of the assignments, although they were taken in good faith: Kingsford *vs.* Merry, 1 Hurl. & Norm., 503, in Exchequer Chamber. So as to a bill of lading: Gurney *vs.* Behrend, 3 Ellis & Bl., 622. The same principle was ruled in Brower *vs.* Peabody, 3 Kern., 121, and in Dows *vs.* Perrin, 2 Smith (Court of Appeals, N. Y.), 325. Such, too, is the elaborate note of the American editors to the case of Lickbarrow *vs.* Mason, 1 Smith's Leading Cases, 751. The reasoning in these cases is so satisfactory that we think the court were right in following them as precedents, and in deciding that the defendant below was not protected by the indorsement of the bill of lading by Bunker to Alburtis.

It will, of course, be conceded that Thompson's relation towards Holly was a fiduciary one, he having been intrusted with money to be used for a specific purpose, without any right to mingle the same with his own money, or in any way to convert the same to his own use, even temporarily. It will also be conceded, and therefore we do not quote authorities to sustain the position, that a *cestui que trust* may follow his money through various forms of mingling and change, and recover the same as against every person not paying value therefor. The principle was conceded by the Circuit Court of Appeals. It is thus stated in 2 Story Eq. Jur., section 1258:—

> The general proposition which is maintained, both at law and in equity upon this subject, is that if any property in its original state and form is covered with a trust in favor of the principal, no change of that state and form can divest it of such trust or give the agent or trustee converting it, or those who represent him, in right (not being *bona fide* purchasers) any more valid claim in respect to it than they had before such change.

Lord Justice Turner, in Pennell *vs.* Deffell, 4 De G., M. & G., 372 and 388, says:—

> It is, I apprehend, an undoubted principle of this court that, as between *cestui que trust* and trustee and all parties claiming under the trustee otherwise than by purchase for valuable consideration without notice, all property belonging to a trust, however much it may be changed or altered in its nature or character, and all the fruit of such property, whether in its original or in its altered state, continues to be subject to or affected by the trust.

In Knatchbull *vs.* Hallett, 13 L. R., Ch. D., 696, in which a very elaborate review of the subject is made, it was decided that though money held by a person in a fiduciary character had been paid by him, the person for whom he held the money could follow it.

In Van Allen *vs.* Bank, 52 N. Y., 1, it was held:—

> Where an agent deposits in a bank to his own account the proceeds of property sold by him for his principal under instructions thus to keep it, a trust is impressed upon the deposit in favor of the principal, and his right thereto is not affected by the fact that the agent at the same time deposits other moneys belonging to himself, nor is it affected by the fact that the agent, instead of depositing the identical moneys received by him on account of his principal, substitutes other moneys therefor. In such case, in an action brought by the principal against the bank upon its refusal to pay upon presentation of the agent's check for the amount so deposited, the bank cannot set up a want of privity. It is a question of title solely.

In Swift *vs.* Williams, 68 Md. Rep., 236, decided in the Maryland Court of Appeals, W. and V. were trustees for the sale of certain real estate. W., being about to go abroad, obtained an order from the court authorizing V. to receive the purchase money from the purchaser, and in all respects to act as fully in all matters pertaining to said trust as if both were present and acting. The purchaser gave V. a check for the purchase money, payable to the order of W. and V., trustees. V. indorsed this check with his own name only as trustee to the Manufacturers' National Bank for deposit, giving the bank

a copy of the court order, and opened an account in that bank in his name as sole trustee, although there was at that time an account in the bank in the name of both trustees. On the same day V. drew a check for a portion of said deposit on said bank, signed by himself alone as trustee, in payment for a debt of a certain company of which he was sole trustee, to one Swift, which debt was in no way connected with the said trust fund, and the check, on reaching the Manufacturers' Bank through the Clearing House, was charged to the said account of V. as sole trustee.

The bank on which the check was drawn which was given to V., and made payable to the order of both trustees by the purchaser of the trust real estate, refused to honor it because indorsed by V. alone. V. thereupon arranged with the Manufacturers' Bank to alter the indorsement by signing W.'s name as trustee, and to change the deposit so as to stand in the names of both trustees. The bank on which the purchaser's check was drawn refused, however, to honor it on such new indorsement, and the purchaser obtained a casiier's check from said bank for the same amount and deposited it in the Manufacturers' Bank to the joint credit of W. and V., trustees, and took up his own check; thereupon V. added the name of W., trustee, per V., trustee, to the check he had theretofore drawn on the Manufacturers' Bank, and it was charged up by that bank against the account in the name of both trustees.

A bill in equity was filed against V., the Manufacturers' Bank and Swift, to whom the amount checked out by V. was paid, to compel the replacement of the trust money which was misappropriated through the check given by V. to S. in payment of a debt which was in no way connected with said trust fund. It was held that the defendant bank equally with the other defendants was bound to see that the trust fund, improperly appropriated through its aid, was made good, and that the question was not one of primary and secondary liability, but whether all who had participated in any degree in bringing about the wrong should not be compelled to see it righted; and further, that an antecedent debt does not form a valuable consideration in a case of this kind, so as to make a

creditor, who is paid from a wrong trust fund, a purchaser without notice.

Per Irving, J.:—

> Swift cannot be regarded a *bona fide* purchaser without notice. He was the creditor of the Gazette Publishing Company, and of its funds in the hands of Veazy, its trustee. As such creditor he received payment from funds belonging to the Bull estate, and from none belonging to the publishing company. The general rule is that an antecedent debt does not form a valuable consideration in a case of this kind, so as to make the creditor who is paid from wrong funds a purchaser without notice (2 Pomeroy Eq., 622, and authorities cited).

Swift *vs.* Williams, 68 Md., 236, is cited in 2d Pomeroy's Equity (edition of 1892), section 747, note, page 1044, as an authority for the statement in the text that—

> No person who has acquired title as a mere volunteer, whether by gift, devise, inheritance, post-nuptial settlement on wife or child, or otherwise, can thereby be a *bona fide* purchaser.
>
> Where an owner has been apparently deprived of his title by a fraudulent conveyance or assignment, which is void, as where, after being executed by him for one purpose, it was fraudulently altered without his knowledge or authority * * * and he has done no collateral act with reference to it which might amount to an equitable estoppel by conduct, and the property by means of such transfer comes into the hands of a purchaser for value and without notice, the original defrauded owner is not barred of his remedy. Equity will relieve by cancelling the fraudulent apparent transfer and by compelling a conveyance or reassignment, even as against the holder who is innocent of wrong. The doctrines of equitable estoppel and of *bona fide* purchase do not apply under these circumstances. Such is the doctrine announced by decisions of the highest authority.
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> 2 Pomeroy's Eq., ed. of 1892, section 918, pages 1302–'3, citing Ogilvie *vs.* Jeaffresen, 2d Gifford, 353;
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> Swan *vs.* N. British, &c., Co., 7 Hurlst & N., 603;
> Taylor *vs.* Railway Co., 4 DeGex & Jones, 559;
> Donaldson *vs.* Gillot, L. R., 3 Equity, 274;
> Barnard *vs.* Campbell, 58 N. Y., 73; S. C., 55 N. Y., 456.

In conclusion, we submit that Thompson's action in the matter of taking Holly's money and appropriating the same for the benefit of his *cestui que trust*, was one for which the latter was responsible. As executor of Saul's estate, Thompson was unable to pay over the same to the residuary legatee because it had been deposited. He therefore appropriated the moneys of Holly, and these, whilst acting as executor of the estate, he paid over to the residuary legatee. The *cestui que trust* cannot profit by the act of the trustee in thus endeavoring to make good a misappropriated trust estate at the expense of an innocent third person.

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